IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Number 442

MILDRED S. STINSON,
as Administratrix of the Estate of A. Bruce Stinson,
Deceased, suing as such Administratrix,
Petitioner,

—vs—

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

Reply to Petitioner's Motion Under Rule 35

PEYTON D. BIBB
NORMAN C. SHEPARD
Attorneys for Respondent.

GRAHAM, BIBB, WINGO & FOSTER
First National Bank Building
Birmingham, Alabama
Of Counsel for Respondent

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REPLY TO PETITIONER'S MOTION UNDER RULE 35

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

In reply to the Petitioner's Motion under Rule 35 for modification of the Court's order of November 18, 1957, Respondent shows unto the Court:

1. The purported statements of record facts and issues made in such motion are incorrect in most material parts.

2. As Respondent has repeatedly pointed out, the only judgment subject to review here is the judgment of the Supreme Court of Alabama entered June 20, 1957 (Petition, p. 2 and its Appendix, p. 27a), which affirmed a verdict of the jury and a judgment of the trial court in favor of this Respondent. The only rec-

ord of the court below which is properly before this Court is the record made upon the second trial and the Petitioner's appeal to the Supreme Court of Alabama from that verdict and judgment adverse to her. The Petitioner's instant motion high-lights the chaos involved in undertaking to decide important contested issues upon a writ of certiorari to a final judgment of a State Court by reinstating a prior judgment of the trial court upon issues which were not involved in the appeal to the State Supreme Court to which the writ was directed.

3. While the record on appeal in the Supreme Court of Alabama on the first appeal is not properly before this Court, at least some parts of it appear to have been physically filed with the Clerk and described by Petitioner only as "certified copy of first trial and judgment of S. Ct. of Alabama". If complete, that record will show, and Respondent hereby certifies, that there were **thirty-seven Assignments of Error** by Respondent (Appellant on that Appeal) on Respondent's appeal to the Supreme Court of Alabama, which involved many different questions. In its original opinion (264 Ala. 522, 88 So. 2d 189) the Supreme Court of Alabama dealt only with the Assignments of Error (numbers 3 and 4) which concerned refusal by the trial court to direct a verdict of the jury in favor of Respondent. In its opinion the Supreme Court of Alabama stated the question then decided as follows:

> "The **fundamental** question in the case is whether the Court erred in refusing the affirmative charge requested in writing by the Defendant."

On the first appeal the Supreme Court of Alabama then concluded that refusal of the affirmative charge requested by Defendant (Respondent) was error neces-

sitating reversal, which was ordered. The Alabama Supreme Court did not, nor was there any occasion for it to pass upon any of Respondent's thirty-five other assignments of error on that first appeal, since the judgment was reversed and a new trial ordered on the ground stated. If the documents now in the Clerk's hands do not include the "Assignments of Error" on the first appeal, Respondent will on notice from the Clerk have a certified copy promptly filed.

4. On the second appeal (by Petitioner from the separate verdict of the jury and judgment of the Court in favor of Respondent) the sole assignment of error and the only question presented to the Supreme Court of Alabama was whether the trial court properly directed the jury to return a verdict in favor of Respondent. Obviously, none of the other thirty-five assignments of error or issues presented on a wholly different prior appeal by Respondent were in any way before the Supreme Court of Alabama on the second appeal by the opposite party.

WHEREFORE, Respondent says that Petitioner's Motion to modify the order of November 18, 1957, in the respects contended for is not well taken and should be dismissed.

Respectfully submitted,

PEYTON D. BIBB
NORMAN C. SHEPARD
Attorneys for Respondent.

GRAHAM, BIBB, WINGO & FOSTER
First National Bank Building
Birmingham, Alabama
Of Counsel for Respondent.

CERTIFICATE OF SERVICE

I, Norman C. Shepard, one of the attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of December, 1957, I served a full, true and correct copy of the foregoing Reply to Petitioner's Motion Under Rule 35 on Mildred S. Stinson, as Administratrix, etc., Petitioner herein, by mailing such copy in a duly addressed envelope with first class Air Mail postage prepaid to her Attorney of Record, Joseph S. Lord III, Esq., addressed as follows:

JOSEPH S. LORD III, Esq.,
c/o Messrs. Richter, Lord & Levy,
Broad and Sansom Streets,
Philadelphia 7, Pennsylvania,

and duly deposited the same in the United States Post Office at Wilmington, North Carolina on said date.

NORMAN C. SHEPARD